UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No. S1-4:16 CR 163 RWS
OSCAR HENRY STEINMETZ,	)	
	)	
	)	
Defendant.	)	

NOTICE OF INTENT TO USE RULE 414 EVIDENCE

COMES NOW the United States of America, by and through its attorneys, Carrie Costantin, Acting United States Attorney for the Eastern District of Missouri, and Robert F. Livergood, Assistant United States Attorneys for said District, and files this notice in accordance with Rule 414(b) of the Federal Rules of Criminal Procedure to provide fifteen days' notice in advance of trial of the general nature of any such evidence it intends to introduce at trial. This case is set for trial on April 3, 2017.

In the instant case, the defendant is charged in Count One with Sexual Exploitation of a Child, in violation of Title 18, United States Code, Section 2251(a) and punishable under Title 18, United States Code, Section 2251(e).

Rule 414(a) states:

> In a criminal case in which the defendant is accused of an offense of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered **on any matter to which it is relevant.**

The rule, Fed. R. Evid. 414(d)(1), defines a "child" as a person below the age of fourteen. "Child molestation" is defined as:

a crime under federal law or under state law (as state is defined in 18 U.S.C. § 513) involving:

(A) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;
(B) any conduct prohibited by 18 U.S.C. chapter 110;
(C) contact between any part of the defendant’s body--or an object--and a child's genitals or anus;
(D) contact between the defendant's genitals or anus and any part of the body of a child's body;
(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or
(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

Rule 414(d)(2).

The defendant is currently charged with an offense of child molestation as that term is defined under Rule 414(d)(2)(B), because the Government has charged him with Sexual Exploitation of a Child in violation of Title 18, United States Code, Chapter 110, §2251(a).

As stated by a Northern Idaho District Court Judge:

> Congress implicitly recognized [] similarities between acts of physical sexual abuse against children and child pornography offenses when it commonly defined them as “offenses of child molestation” within the ambit of Rule 414. *See* Rule 414(d); *cf. United States v. Julian*, 427 F.3d 471, 488 (7th Cir. 2005) (holding that evidence of a distinguishable prior sexual assault was admissible under [FRE] 413 because, based on the evidence, “a jury might reasonably infer from the prior conviction that [the defendant] was a pedophile and in turn surmise that [the defendant's conduct] was not as innocent as the defense made it out to be”).

United States v. Bentley, 475 F.Supp. 2d 852, 858-59 (N.D.Iowa 2009).

1. Evidence that the Government Anticipates Introducing Pursuant to Rule 414

Pursuant to Rule 414, the Government intends to introduce evidence that defendant committed the crime of Statutory Sodomy in the First Degree against the victim, “F,” when the victim was less than fourteen years of age, or those acts that occurred with the victim before the end of March in 2001.

In 2001, a person committed the crime of Statutory Sodomy in the First Degree if the person had deviate sexual intercourse with another person who was less than fourteen years of age. Mo. Rev. Stat. § 566.062 (1995). "Deviate sexual intercourse" was defined as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person." Mo. Rev. Stat. § 566.010(1).[1]

Additionally, the Government intends to introduce evidence that the defendant committed the crime of Possession of Child Pornography in violation of Title 18, United States Code, Section 2252A(a)(5)(B), by possessing images of children pornography that depicted children who were less than fourteen years of age in a lascivious exhibition of their genitals.

The undersigned provided reports of law enforcement officers and witnesses regarding the defendant's sexual conduct involving the victim. At trial in this case, the Government intends to call "F," the victim in this case, to testify. "F's" testimony will be consistent with the reports previously provided, including "F's" written statements. *See* F's written statement (pp. Steinmetz_00134 - Steinmetz_00139); Maryland Heights Police Department Report (pp. Steinmetz_00035 - Steinmetz_00040; Steinmetz_00048 - Steinmetz_00056; and p.

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1 This definition became effective on August 28, 2000. Prior to August 28, 2000, the definition of "deviate sexual intercourse," was "any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person."

Steinmetz_00083).

Briefly, the Government believes that the testimony would be that when “F” was thirteen years old, the defendant started to massage “F’s” back. The defendant had the TV on and was playing an anime video of a snake raping girls. As this was playing, he raised “F’s” shirt and rubbed her breasts. Later in the investigation, law enforcement officers located anime videos. “F” was able to identify the videos that the defendant played while he molested her. The titles were “Twin Angels” and “LA BLUE.”

The sexual abuse continued. Sometimes the defendant would go into “F’s” bedroom and have her undress. He would kiss her and perform oral sex on her. “F” started to lock her bedroom door, but the defendant used a screw driver to break in.

During other times, the defendant said he was checking on “F’s” development and would insert his fingers into her vagina. Defendant would also say he needed to check her development and would take digital photos of standing naked. The Government plans introducing some of these photos of “F” standing nude, and of F’s breasts and buttocks. Sometimes the defendant would offer cash when he took naked pictures of her. He also had “F” touch his penis. Sometimes the defendant had “F” put on sexually related clothing and flogged her.

In addition to the evidence of concerning “F,” the Government plans to introduce evidence that the defendant possessed images of child pornography. These images were located on defendant’s Western Digital hard drive (Item 9). The pictures had been deleted but were forensically located on the hard drive. The pictures included that the Government anticipates introducing are the following:

1. 45324.jpeg, a graphic image file that depicts a naked prepubescent minor female,

under the age of fourteen, in a lascivious exhibition of her genitals;

2. 45325.jpeg, a graphic image file that depicts two naked girls standing together, one of which is a prepubescent minor female, under the age of fourteen years, in a lascivious exhibition of her genitals.

Additionally, located on Item 9, were deleted images of the victim. Some of the images were of the victim's genitals, lying naked on her bed, standing naked wearing bondage type clothing, and close-up photos of her genitals and breasts.

On Item 8, another of defendant's Western Digital hard drives, were the same pictures of the victim, plus two additional images: one a close-up photo of her breasts, and a close-up photo of her genitals. Those images were not deleted were located in the following file path: /My Documents/My Pictures/Family/Ed/Ed a/Ed b/Ed c/.

2. Discussion

Rule 414 embodies a "strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible." *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997). Specifically, Rule 414 recognizes that:

> a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of a defendant--a sexual or sado-sexual interest in children--that simply does not exist in ordinary people. Moreover, such cases require reliance on child victims whose credibility can readily be attacked in the absence of substantial corroboration. In such cases, there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense.

140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole) (cited with approval in *United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997)).

In *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001), the Court discussed the changes caused by Rule 414:

> Evidence of prior bad acts is generally not admissible to prove a defendant's character or propensity to commit crime. FED.R. EVID. 404(b). However, Congress altered this rule in sex offense cases when it adopted Rules 413 and 414 of the Federal Rules of Evidence. Now, in sexual assault and child molestation cases, evidence that the defendant committed a prior similar offense "may be considered for its bearing on any matter to which it is relevant, including the defendant's propensity to commit such offenses." FED.R. EVID. 413(1), 414(a). If relevant, such evidence is admissible unless its probative value is "substantially outweighed" by one or more of the factors enumerated in Rule 403, including "the danger of unfair prejudice."

In *Gabe*, the Court affirmed the admission of evidence that the defendant had molested a young girl twenty years earlier. "'Because propensity evidence is admissible under Rule 414,' the fact that evidence of prior acts suggests a propensity to molest children, 'is not unfair prejudice." *United States v. Bentley*, 561 F.3d 803, 815 (8th Cir. 2009), quoting *Gabe*, 237 F.3d at 960. "Rule 414(a) displaces [FRE] 404(b)'s restriction on propensity evidence and allows the government to offer evidence of a defendant's prior sexual misconduct for the purpose of demonstrating the defendant's propensity to commit the charged offense." *United States v. McHorse*, 179 F.3d 889, 903 (10th Cir. 1999).

In *United States v. LeCompte*, 131 F.3d 767 (8th Cir. 1997), the Court reversed the district court's decision to exclude evidence that the defendant had molested a young girl ten years before the charged counts. The Court quoted Congressional intent:

> Rule 414 and its companion rules...are "general rules of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions...The new rules will supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)."

Id., at 769. The Court noted that Rule 403 must still be applied. "However, Rule 403 must be applied to allow Rule 414 its intended effect." *Id; see also United States v. Luger*, 837 F.3d 870, 874-5 (8th Cir. 2016) (Sexual assaults that occurred more than 25 years prior to trial properly admitted after district court conducted a Rule 403 balancing test); U*nited States v. Withorn*, 204 F.3d 790 (8th Cir. 2000) (admission of rape of another juvenile); *United States v. Angle*, 234 F.3d 326 (7th Cir. 2000) (admission of twenty year old sodomy conviction and ten year old child molestation conviction in trial for child pornography charges).

In *United States v. Meachem*, 115 F.3d 1488, 1492 (10th Cir. 1997), the Court stated that "The historical notes to the rules and congressional history indicate that there is no time limit beyond which prior sex offenses by a defendant are inadmissible." The Court quoted the Congressional history: "No time limit is imposed on the uncharged offenses for which evidence may be admitted; as a practical matter, evidence of other sex offenses by the defendant is often probative and properly admitted, notwithstanding very substantial lapses of time in relation to the charged offense or offenses." *Id.* The Court concluded that "Rule 403 balancing is still applicable [citations omitted], but clearly under Rule 414 the courts are to 'liberally' admit evidence of prior uncharged sex offenses." *Id.*

"Under Rule 414(a), the key to admissibility is relevance, and no independent evidence of the commission of the prior bad act is required." *United States v. Norris*, 428 F.3d 907, 913 (9th Cir. 2005). In *Norris*, defendant's admission that he had molested T.V.'s sister was admitted in the prosecution for his molestation of T.V. The Court rejected the defendant's argument that *corpus delicti* evidence was required before defendant's admission to molesting T.V.'s sister could be heard by the jury.

Rule 414 states that "evidence of defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing **on any matter to which it is relevant**." The evidence offered is relevant, even though it occurred more than sixteen years ago, because the defendant committed the sexual acts on the victim during the same time period that he took the child pornographic photos of her.

To ensure the jury understands how the Rule 414 evidence is to be considered, a limiting instruction will be offered.

For the foregoing reasons, the Government respectfully requests that the Court admit the evidence outlined above pursuant to Rule 414.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Lucy Liggett,
Assistant Federal Public Defender.

*_/s/ Robert F. Livergood_*
Robert F. Livergood, #35432MO
Assistant U.S. Attorney